No 43811-9-II

COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

SANDRA PEGER, an individual,

Appellant,

v.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF PORT ANGELES, et al.,

Respondents.

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR CLALLAM COUNTY

Cause No. 12-2-00600-1

BRIEF OF RESPONDENTS

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I. INTRODUCTION

The superior court case from which this appeal was taken is still pending in Clallam County. This appeal only involves CR 11 sanctions imposed at the time of a hearing held on a motion for a temporary restraining order. The CR 11 sanctions were imposed against both the plaintiff Sandra Peger and the law firm representing her. The appeal notice suggests the appeal was only filed on behalf of the law firm as a judgment debtor. The notice does not purport to be an appeal of the CR 11 sanctions imposed against Sandra Peger. Since the filing of this appeal, the Stafne Law Firm has withdrawn as the attorneys for Sandra Peger. CP 170.

II. STATEMENT OF CASE

Sandra Peger and Lawrence Clark obtained a loan for $172,500 secured with a deed of trust on twenty acres of unimproved property located in Clallam County on June 17, 2005. CP 74. Payments on the debt became delinquent in December of 2010. CP 75. Foreclosure action was delayed because of two bankruptcy filings. One was a Chapter 13 filing which was dismissed in July of 2011. CP 75-76. A notice of default informing Ms. Peger and Mr. Clark of the specifics of the delinquency, the

ownership of the note by First Federal and the contact person at First Federal, who was the servicer of the loan, was sent on November 28, 2011. CP 81,83. A Chapter 7 bankruptcy filing further delayed foreclosure until a relief from automatic stay order was entered on June 18, 2012. CP 84. The sale date was ultimately set for July 13, 2012. CP 76.

The Stafne Law Firm on behalf of Sandra Peger, according to the Declaration of Andrew Krawczyk, CP 30, mailed a copy of the unfiled complaint, motion and summons by Federal Express on Thursday, July 5, 2012 to the trustee's office. This was followed on Friday, July 6, 2012 by faxed copies of said documents to the same office with the hearing set for the following Thursday, July 12. CP 31. The trustee did not see any of the documents until Sunday, July 8, 2012. CP 21. Prior to filing the complaint and attending the hearing, Ms. Peger's attorney made no attempt to contact the bank directly to inquire about possible transfers of the note and deed of trust. Opening Brief of Appellant, page 4, footnote 6.

On Tuesday, July 10, 2012, the Stafne Law Firm filed the complaint in Clallam County Superior Court for damages, declaratory judgment, injunctive relief and to quiet title. CP 105. At the same time, they filed a Motion for Restraint of Sale and Temporary Restraining Order, CP 97, along with a note for calendar action set for 1:00 p.m. two

days later on July 12, 2012. CP 95. At the time of filing the complaint, it was not verified with no page even allowing for verification. No declaration or affidavit accompanied the motion for a temporary restraining order when it was filed on July 10, 2012.

The defendants responded on July 11, 2012 by filing both the Declaration of Kammah Morgan, the Special Assets Manager of First Federal, CP 74, and a Response to Plaintiff's Motion by the law firm representing First Federal. CP 88. These documents were faxed to the Stafne Law Firm on July 11, 2012. CP 72. During the hearing, the attorney representing Sandra Peger, Andrew Krawczyk, produced a verification signed by Ms. Peger on July 12, CP 32, and also provided his own declaration in support of his motion signed on July 12. CP 29. Mr. Krawczyk requested to see the bank's note at the hearing and was told it was in the possession of the trustee. CP 25. No such previous request had been made by the attorney before proceeding with the hearing.

Following argument at the hearing, the commissioner signed the proposed order submitted and prepared by First Federal's attorneys prior to the hearing and before the verification and declaration of Andrew Krawczyk were handed to the commissioner during the hearing. The commissioner added language to the end of the proposed order granting judgment in favor of First Federal for their attorneys' fees and expenses

against Sandra Peger and the Stafne Law Firm for violation of CR 11. CP 9. The amount was to be determined at a later hearing. The hearing on attorneys' fees and costs was held on August 1, 2012. No one from the Stafne Law Firm filed a response to the fee request nor appeared at the hearing. CP 12. The commissioner signed the judgment for $3,400. CP 13.

III. ARGUMENT

The sole assignment of error concerns whether the trial court erred in imposing CR 11 sanctions against Sandra Peger's attorneys for signing a complaint without having made reasonable inquiry into the facts under the circumstances. As stated in the Brief of Appellant at page 13 and 14, the standard of review is abuse of discretion and will not be repeated here.

A. Failure to Reasonably Investigate Ownership of Note.

The Brief of Appellant devotes twelve pages in the Statement of the Case portion of the brief attempting to justify the filing of a grossly false and unfounded complaint. Many of those pages concern the attorneys' claimed knowledge of cases arising in other jurisdictions and articles on trends in the handling of loans by financial institutions.[1]

[1] *See also* Plaintiff's Complaint, footnote 1, CP 108 for a list of cases cited as being the basis for the attorney's belief the note had been sold.

Interestingly nowhere in these twelve page is there any indication that an effort was made to directly contact First Federal or the trustee to request verification of whether the note had been sold to a third party or if First Federal in fact still had possession of the note even though the attorneys were aware a nonjudicial foreclosure required the trustee to have proof by way of a declaration signed under penalty of perjury stating the beneficiary is the actual holder of the note.[2] One of the allegations used as a basis for the complaint was that First Federal did not have ownership of the note, CP 114, 115, and therefore there was no authority to foreclose. CP 115-117.

B. RESPA/TILA Allegations.

The Brief of Appellant on pages 2 and 3 also makes reference to the attorney's reliance on the lack of a response by First Federal to a letter written by Ms. Peger to First Federal which the attorneys assert was a debt validation letter or other request for information under RESPA/TILA.[3] This letter has not been made part of any record so it is difficult for the court to assess how this might have impacted the attorneys in their decision to file a complaint without contacting the bank themselves. They

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[2] This is required by RCW 61.24.030(7)(a).

[3] RESPA (Real Estate Settlement Procedures Act, 12 USC 2605). TILA (Truth in Lending Act, 15 USC 1601).

do acknowledge in their brief on page 3, footnote 1, that Kammah Morgan in her declaration stated she viewed the letter as one issued pursuant to the Fair Debt Collection Practices Act (FDCPA). As stated in Ms. Morgan's declaration, the FDCPA does not apply to creditors collecting a debt which originated with them. CP 76.[4]

RESPA would also not be applicable because it only applies to requests concerning the servicing of a loan. Under RESPA, a borrower can make a qualified written request. Section 12 USC 2605(e)(B) defines a qualified written request as follows:

> For purposes of this subsection a Qualified Written Request shall be a written correspondence, other than notice on a payment coupon or other payment medium supplied by the servicer, that (i) includes, or otherwise enables the servicer to identify the name and account of the borrower; and (ii) includes a statement of the reasons for the belief of the borrower, to the extent applicable that the account is in error or provides sufficient details to the servicer regarding other information sought by the borrower.

In this case, the complaint did not address issues concerning the servicing of the loan but rather claimed the bank sold the loan and therefore had no authority to foreclose nonjudicially. Even assuming the

[4]The FDCPA is found in 15 USC 1692 as part of TILA, 15 USC 1601 et seq. 15 USC 1692(g) lists exceptions to the term "debt collector." The exception applicable to First Federal states "...any person collecting or attempting to collect any debt owed or due or asserted to be owed and due another to the extent such activity...concerns a debt which was originated by such person...." The FDCPA also does not require the production of any documents, but rather a written notice containing certain information from debt collectors who are subject to the Act.

letter had anything to do with possession and ownership of the note, such a request would not have fallen under RESPA. Ms. Peger's attorneys should not be allowed to rely on a letter they have not provided in this appeal, which letter would not have in any case required a response under either RESPA or FDCPA, to justify their failure to adequately investigate if First Federal in fact did retain their loan.

C. Failure to Comply With Hearing Notice Requirements.

While the appeal does not challenge the court's ruling denying the motion to issue a restraining order, the Brief of Appellant on pages 2-4 suggests they needed to file the action without doing a thorough investigation of the facts because the sale date of July 13 was to occur shortly after they first met with Ms. Peger on June 29, 2012. The brief then points out the efforts made to notify the trustee of the motion prior to the sale in order to comply with RCW 61.24.130. That statute states in part in subsection (2) as follows:

> (2) No court may grant a restraining order or injunction to restrain a trustee's sale unless the person seeking the restraint gives five days notice to the trustee of the time when, place where, and the judge before whom the application for the restraining order or injunction is to be made. This notice shall include copies of all pleadings and related documents to be given to the judge. No judge may act upon such application unless it is accompanied by proof, evidenced by return of a sheriff, the sheriff's deputy, or by any person eighteen years of age or over who is

competent to be a witness, that the notice has been served on the trustee.

Because none of the pleadings arrived in the trustee's office until Friday, July 6, CP 30, 31, they were already too late to restrain the sale.[5] They also failed to file a declaration to support the motion until the moment of the hearing on July 12, CP 25, even though the statute requires that all pleadings be served on the trustee five days before the hearing. In addition, they did not establish that service by mailing on July 5, CP 30, or faxing on July 6 to the trustee's office, meets the requirements of proof of service on the trustee as required by RCW 61.24.130(2).

By proceeding with the motion without compliance with the requirements of the statute that allows such a motion to be heard, Ms. Peger's attorneys not only caused First Federal to have to incur expenses responding to the matter on short notice, it also led to the hurried filing of a complaint without adequate investigation of the facts alleged in the

[5] The five day notice requirement of RCW 61.24.130(2) is subject to CR 6(a) which provides that when the time period is less than seven days, Saturdays and Sundays are not included. You also do not include the day of the act from which you begin your time computation. The time computation is also subject to CR 5(b)(2) which provides if service is by mail it is deemed complete the third day following the day of mailing unless that day falls on a Saturday or Sunday in which case it is the next day following the day which is not a Saturday or Sunday. In this case the motion was mailed on Thursday, July 5, CP 30. Three days following that date was Sunday, the 8th so service was deemed to be Monday the 9th. Even if you count the 9th as the first day, which is contrary to CR 6(a), it would still only be three days notice before the hearing.

complaint. Had they waited until they completed their investigation into ownership of the note, they would have saved all parties a lot of time and expense.[6] All that remains now are claims with factual disputes such as the tortious interference with a business expectancy claim. CP. 150-152.

D. Findings of Fact Concerning Non-Owner Occupied and No Irreparable Harm.

The Brief of Appellant on page 16 questions what the findings in the order denying the temporary restraining order addressing the property not being owner occupied and that the property was open space forest land had to do with the sanctions imposed. They also question what the finding of no equity in the property had to do with the sanctions. The answer is that those findings had nothing to do with the sanctions, but rather had everything to do with the portion of the order denying the temporary restraining order to stop the foreclosure sale. The motion for a temporary restraining order brought by Ms. Peger's attorneys relied on CR 65[7] and

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[6] Three months later, they finally filed an amended complaint, CP 147, which eliminated most of the previous unfounded claims including the original fourth cause of action concerning no valid interest in the deed of trust, the fifth cause of action concerning quiet title and slander of title, the sixth cause of action concerning violation of the Deed of Trust Act, the seventh cause of action concerning Consumer Protection Act violation and the eighth cause of action alleging criminal profiteering.

[7] CR 65(b) requires a verified complaint or affidavit showing immediate and irreparable injury in order to justify the issuance of a temporary restraining order. Neither of these were provided when the motion was filed on July 10.

RCW 7.40 to establish the procedure and standards for issuance of a temporary restraining order. CP 99.

The motion claimed irreparable harm if the foreclosure took place. CP 101. The motion claimed there was a clear threat of loss of a "primary residence,"CP 99, and threat of loss to "Peger's interest in her home." CP 100. The declaration of Kammah Morgan dispelled those notions by pointing out there was no home on the property since Ms. Peger lived elsewhere and there would be no irreparable harm in completing the sale because there was no equity in the property. CP 75. With no contrary evidence before the court, those findings were necessary to support the order denying the motion.[8]

E. CR 11 Sanctions.

Sandra Peger's attorneys are correct the only basis for being sanctioned was the attorney's failure to conduct a reasonable pre-filing investigation. CP 8. A recent Washington appellate case, *Stiles v. Kearney,* 168 Wn. App. 250, 277 P.3d 9 (2012), included a review of sanction requirements imposed both under RCW 4.84.185 (frivolous

[8] The deed of trust foreclosure statutes have additional notice requirements and procedures when the deed of trust secures "owner occupied" residential real property. *See for example,* RCW 61.24.030(7)(a).

action statute) and CR 11. In discussing the CR 11 requirements, the court stated as follows on pages 261-262:

> CR 11 deals with two types of filings: baseless filings and filings made for improper purposes. *MacDonald v. Korum Ford,* 80 Wash. App. 877, 883, 912 P.2d 1052 (1998). This case concerns a baseless filing. A filing is 'baseless' when it is '(a) not well grounded in fact; or (b) not warranted by (i) existing law or (ii) a good faith argument for the alteration of existing law.' *MacDonald,* 80 Wash. App. At 883-84, 912 P.2d 1052 (quoting *Hicks v. Edwards,* 75 Wash. App. 158, 163, 786 P.2d 953 (1994), *review denied*, 125 Wash. 3d 1015, 890 P.2d 20 (1995).
>
> A trial court may not impose CR 11 sanctions for a baseless filing 'unless it also finds that the attorney who signed and filed the [pleading, motion or legal memorandum] failed to conduct a *reasonable inquiry* into the factual and legal basis of the claim. *Bryant v. Joseph Tree, Inc.,* 119 Wash. 2d 210, 220, 829 P.2d 1099 (1992). Courts employ an objective standard in evaluating an attorney's conduct and test the appropriate level of prefiling investigation by inquiring what was reasonable to believe at the time the pleading was filed. *Biggs,* 124 Wash.2d at 197, 876 P.2d 448, *see Miller v. Badgley,* 51 Wash. App. 285, 299-300, 753 P.2d 530, *review denied*, 111 Wash.2d 1007, 1988 WL 631990 (1988) (after 1985 amendment to CR 11, rule now imposes an objective rather than subjective standard of reasonableness). Finally, to impose sanctions for filing a baseless complaint, the trial court must make findings specifying the actionable conduct. *N. Coast Elect. Co. v. Selig,* 136 Wash.App. 636, 649, 151 P.3d 211 (2007).

In this case the commissioner did not indicate the filing was for an improper purpose. Instead it was because of a baseless filing not well grounded in fact. The commissioner found there was no reasonable

investigation under the circumstances. CP 8. While the Stafne Law Firm argues they were pressed for time and assumed all banks acted the same prior to filing the complaint, they made no inquiry into the ownership of the note even though they had from June 29 (first meeting) until July 10 (date of filing complaint) to do so. As attorneys who were apparently familiar with deed of trust foreclosures, they certainly would have been aware of the deed of trust non-judicial foreclosure requirement that a trustee is prohibited from conducting a sale without a signed statement under penalty of perjury that the creditor was the owner of the note. This lack of any inquiry whatsoever directed either to the creditor First Federal or the trustee led to the filing of a complaint filled with totally false and unjustified allegations and claims. Only after finally making the simple request to see the note did they amend the complaint to exclude most of the baseless claims.

In the *Stiles* case the Court of Appeals upheld the trial court's sanctions under both CR 11 and RCW 4.84.185 stating:

> We note that CR 11 and RCW 4.84.185 sanctions are not mandatory, and that reasonable minds might differ on whether to exercise the discretion to impose sanctions in a particular case. CR 11 (stating, 'If a pleading, motion, or legal memorandum is signed in violation of this rule, the court *may* impose upon the person who signed it an appropriate sanction.') (emphasis added); RCW 4.84.185 (stating, 'In any civil action, the court having jurisdiction may...require the nonprevailing party to pay...reasonable

> expenses.") (emphasis added). But under an abuse of discretion standard, we can only reverse a trial court's sanction decisions if the decisions are manifestly unreasonable or based on untenable grounds. *Wash. State Physicians, Inc. Exch.*, 122 Wash.2d at 339, 858 P.2d 1054. Here, the trial court's decision is not unreasonable or based on untenable grounds and must be affirmed.

Stiles, supra, page 263.

Had Ms. Peger's attorneys made the easy inquiry of note ownership prior to the filing of the complaint, First Federal would not have incurred fees in having to respond to the motion on short notice. Awarding the sanction of the fees incurred in responding to the notice was not "manifestly unreasonable or based on untenable grounds."[9]

IV. ATTORNEYS' FEES (RAP 18.1)

First Federal requests an award of attorneys' fees on appeal. The notice of appeal suggests the appeal is on behalf of the law firm as a judgment debtor. If the appeal is considered to also impact the judgment that was jointly imposed against the plaintiff, Ms. Peger, then if the commissioner's ruling is upheld on appeal, First Federal would be considered the prevailing party under RCW 4.84.330 concerning awards

[9] It should also be noted the commissioner could have justified an award fees against Ms. Peger under the terms of the deed of trust allowing for fees, CP 142, and RCW 4.64.330 that allows for attorneys' fees to be awarded to the prevailing party in litigation involving a contract that has attorneys' fees provisions. *See also CHD, Inc. v. Boyles,* 138 Wn. App., 131, 140, 157 P.3d 415 (2007).

of attorneys' fees to a prevailing party in litigation involving contracts with attorney fee clauses.

This was a suit on a deed of trust which contains an attorneys' fee clause. CP 142. In the case of *CHD, Inc. v. Boyles*, 138 Wn. App. 131, 157 P.3d 415 (2007) the court upheld a fee award to the creditor when she prevailed in a summary judgment motion to dismiss a declaratory action filed prior to her non-judicial deed of trust foreclosure sale. As stated in Footnote 9 in this brief, the commissioner could have awarded fees under RCW 4.84.330 against Ms. Peger at the original hearing or on a later motion based on First Federal prevailing in defending against the motion to restrain the trustee's sale.

V. CONCLUSION

One of the risks an attorney takes on when deciding to rapidly prepare and file a complaint under their signature without prior verification from their client and without conducting any independent investigation of critical facts, is that the allegations and claims may be completely baseless. The impact on the defendants of a baseless filing is significant, particularly when the plaintiff's attorney uses the baseless complaint as the grounds to apply for a temporary restraining order on short notice. Ms. Peger's attorneys in this case were not careful or reasonable by failing to confirm ownership of the note before filing their

complaint two days before a temporary restraining order hearing and three days before a scheduled trustee's sale. They had more than sufficient time to contact either the bank or the trustee to verify possession and ownership of the note rather than drafting a 23 page complaint full of erroneous assumptions. The commissioner exercised his discretion in finding no reasonable inquiry had been made of the facts under the circumstances of the case by the attorneys. The decision to award $3,400 in sanctions to reimburse First Federal for expenses incurred in responding to the improperly brought temporary restraining order motion was not manifestly unreasonable. The commissioner's decision should be upheld.

DATED this day 28 of December, at Port Angeles, Washington.

Respectfully submitted,

Gary R. Colley, WSBA # 721
Attorney for Respondents

No. 43811-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SANDRA PEGER, Appellant, v. FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF PORT ANGELES, et al., Respondents.	)	CERTIFICATE OF MAILING

I am a resident of the state of Washington and over the age of 18 years. On the 3rd day of January, 2013, I deposited in the United States Mail a properly stamped and addressed envelope containing a copy of BRIEF OF RESPONDENTS and this CERTIFICATE OF MAILING to the following:

Scott Stafne
Andrew J. Krawczyk
Stafne Law Firm
239 N. Olympic Ave.
Arlington, WA 98223

Sandra Peger
4441 Woodcock Rd.
Sequim, WA 98383

DATED this 3rd day of January, 2013.

Terrie K. Dixon

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January 3, 2013

Sent via certified mail, return receipt requested

Washington State Court of Appeals
Division II
950 Broadway, Suite 300
Tacoma, WA 98402

Attn: Sandy

RE: Case #: 43811-9-II: Sandra Peger v. First Federal Savings and Loan Association of Port Angeles
Clallam County Superior Court Cause No. 12-2-00600-1

Dear Sandy:

Enclosed please find the Brief of Respondents and Certificate of Mailing for filing with the court. Please return the enclosed face pages of these documents conformed in the enclosed envelope. Thank you.

Yours very truly,

PLATT IRWIN LAW FIRM

Terrie K. Dixon, Assistant to Gary R. Colley

tkd
Enclosure